No. 95-766

Supreme Court, U.S.
F I L E D
DEC 7 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

E. BENJAMIN NELSON, in his official capacity as Governor of the State of Nebraska; DONALD STENBERG, in his official capacity as Attorney General of the State of Nebraska; and MARY DEAN HARVEY, in her official capacity as Director of the Nebraska Department of Social Services,

Petitioners,

—v.—

G. WILLIAM ORR, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; and WOMENS SERVICES, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LAWRENCE I. BATT
Batt & Associates
400 Continental Bldg.
Omaha, Nebraska 68102
(402) 346-2000

SIMON HELLER
Counsel of Record
JANET BENSHOOF
The Center for Reproductive Law & Policy
120 Wall Street, 18th fl.
New York, New York 10005
(212) 514-5534

Attorneys for Respondents

QUESTION PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

Whether, as this Court has held, the federal Medicaid Act may be enforced under 42 U.S.C. § 1983?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED 6

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION 9

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court 9

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision 13

C. Because the Challenged Provision Directly Conflicts with Federal Law, the Supremacy Clause Requires That It Be Enjoined 15

III. THE COURT OF APPEALS CORRECTLY HELD THAT TITLE XIX IS ENFORCEABLE UNDER 42 U.S.C. § 1983 15

CONCLUSION 18

y

TABLE OF AUTHORITIES

Cases: **Page:**

Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich. 1986), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. 1991) 10

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 14

Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976) 11

Dodge v. Department of Social Services, 657 P.2d 969 (Colo. Ct. App. 1982) 11

Doe v. Bolton, 410 U.S. 179 (1973) 14

Doe v. Busbee, 481 F. Supp. 46 (N.D. Ga. 1979) 11

Edwards v. Hope Medical Group for Women, 115 S. Ct. 1 (Scalia, Circuit Justice 1994) 8

Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170 (3rd Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-820) 6

Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977) 11

Fargo Women's Health Org. Inc. v. Wessman, No. A3-94-36 (D. N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995) 7

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 15, 16

Harris v. McRae, 448 U.S. 297 (1980) 9, 12, 13

Hern v. Beye, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995) 6, 7, 8

Hodgson v. Board of County Comm'rs, County of Hennepin, 614 F.2d 601 (8th Cir. 1980) 7, 10-11, 17

Hope v. Childers, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) 7

Hope Medical Group for Women v. Edwards, 63 F.3d 418 (5th Cir. 1995), *reh'g denied*, No. 94-30445, LEXIS U.S. App. 33214 (5th Cir. Oct. 17, 1995) 6

Jeannette R. v. Ellery, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) 7

National Railroad Passenger Corp. v. Boston & Maine Corp., 530 U.S. 407 (1992) 14

Orr v. Nelson, 874 F. Supp. 998 (D. Neb. 1995), *aff'd*, No. 95-1555 (8th Cir. Oct. 4, 1995) 18

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 17

Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) 10

Planned Parenthood Affiliates of Michigan v. Engler, 860 F. Supp. 406 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal pending*, Nos. 94-1913 & 94-2097 (6th Cir. argued Oct. 13, 1995) 7

Planned Parenthood of Missoula Inc. v. Blouke, 858 F. Supp. 137 (D. Mont. 1994) 7

Planned Parenthood v. Wright, No. 94 C 6886, 1994 WL 750638 (N.D. Ill. Dec. 6, 1994) 7

Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) 7, 8, 17

Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980) 7, 17

Roe v. Casey, 623 F.2d 829 (3d Cir. 1980) 7, 17

Stangler v. Shalala, No. 94-4221-CV-C-5 (W.D. Mo. Dec. 28, 1994) 7

Suter v. Artist M., 503 U.S. 347 (1993) 4, 5, 15, 16

Utah Women's Clinic, Inc. v. Graham, 892 F. Supp. 1379 (D. Utah 1995) 7

Van Lare v. Hurley, 421 U.S. 338 (1975) 15

Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) 10

Weil v. Hern, cert. denied, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995) 6

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) 9, 16

Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 7, 7-8, 17

Constitutional Provisions, Statutes, and Regulations:

United States Constitution, Article VI, clause 2 . . . . . 15, 16

42 U.S.C. §§ 1396-1396u (1994) 9

42 U.S.C. § 1396a(a)(10)(A) (1994) 1, 9

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) 1-2, 10

42 U.S.C. § 1396d(a) (1994) 10

42 U.S.C. § 1983 . . . . . 4, 15, 16

Pub. L. No. 96-369, § 101(c), 94 Stat. 1352 (1980) 12

Pub. L. No. 96-536, § 109, 94 Stat. 3166 (1980) 12

Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14 (1981) 12

Pub. L. No. 97-377, § 204, 96 Stat. 1830 (1982) 12

Pub. L. No. 103-112, § 509, 107 Stat. 1082 (1993) 2

Pub. L. No. 103-333, § 509, 108 Stat. 2539 (1994) 1, 2

Neb. DPW Program Manual § 18-004.08 (1982) 3

Sup. Ct. R. 10(a) 4

Sup. Ct. R. 10(c) 4

Sup. Ct. R. 14.2 6

Sup. Ct. R. 14.4 6

Sup. Ct. R. 33 6

Other:

Petition for Certiorari, *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995) (No. 95-820) 6

Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 12

David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 12

Respondents G. William Orr, M.D., *et al.*, submit this brief in opposition to the petition for a writ of certiorari filed by petitioners the Governor of Nebraska, the Attorney General of Nebraska, and the Director of the Nebraska Department of Social Services. Petitioners seek review of a decision of the United States Court of Appeals for the Eighth Circuit, issued July 25, 1995, affirming the judgment of the United States District Court for the District of Nebraska entered on November 4, 1994. The opinion of the Court of Appeals is reported at 60 F.3d 497 (8th Cir. 1995).

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994), provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[1] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on August 12, 1994, seeking

---

[1] *See* note 7, *infra*.

declaratory and injunctive relief barring enforcement of Neb. DPW Program Manual § 18-004.08 (1982) ("the challenged provision"), for so long as Nebraska receives federal Medicaid funding. The challenged provision would deny Nebraska Medicaid recipients coverage for abortions except when "the life of the mother would be endangered if the fetus were carried to term." Neb. DPW Program Manual § 18-004.08 (1982) (reproduced at Pet. 2).[2] Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provision must be enjoined because it directly conflicts with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

The district court granted respondents' motion for summary judgment, ruling that "having taken federal funds, Nebraska must follow federal law," App. 30, and that the challenged provision is "invalid under the Supremacy Clause of the United States Constitution." App. 31.

On December 1, 1994, petitioners filed a Notice of Appeal of the final judgment of the district court entered on November 4, 1994. The appeal was consolidated with a nearly identical case challenging an Arkansas restriction on Medicaid funding of abortions. On July 25, 1995, the United States Court of Appeals for the Eighth Circuit unanimously affirmed the decision of the district court. *See* App. 21-22.[3] The State's petition for rehearing and

---

[2]Citations to the text of the petition for certiorari are in the form "Pet. --"; citations to the appendix to the petition are in the form "App. __."

[3]Judge Bowman dissented only from the severability holding in the Arkansas case, but did not dissent from the holding that participating

(continued...)

suggestion for rehearing *en banc* were denied on September 22, 1995. *See* App. 34.

REASONS FOR DENYING THE WRIT

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. Petitioners do not claim that the decision of the court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Nor could they. Indeed, the decision of the court below is in complete harmony with the decisions of the United States courts of appeals for the First, Third, Fifth, Seventh and Tenth Circuits, as well as six recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioners argue that the petition should be granted because the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and because the decision of the court of appeals conflicts with this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992). Petitioners are wrong on both counts.

First, petitioners misstate the decision of the court

---

[3](...continued)
states must, under Title XIX, provide Medicaid coverage for those medically necessary abortions for which federal funding is available, or from the holding that Title XIX may be enforced through 42 U.S.C. § 1983.

below as supporting "the proposition that whenever Congress makes federal Medicaid funding for a particular service or procedure available, States are therefore compelled to pay for that service or procedure as well." Pet. 5. The court of appeals actually held that Title XIX, the federal Medicaid statute, imposes obligations on the states to provide Medicaid coverage for medically necessary abortions. *See* App. 15. Title XIX itself makes clear that particpating states must provide coverage for certain categories of procedures and services that are mandatory, and abortion falls squarely within several of those categories.

Second, petitioners purport to find a conflict between the lower court's ruling that Title XIX is enforceable under 42 U.S.C. § 1983, and this Court's decision in *Suter v. Artist M.* But *Suter* has nothing to do with state obligations under the federal Medicaid program or with abortion. Rather, petitioners invoke *Suter* for the generic proposition that Congressional conditions on a state's receipt of federal funds must be unambiguous. What petitioners fail to note, however, is that for over fifteen years federal law has, in fact, been unambiguous that state Medicaid programs must cover all medically necessary abortion services for which federal funding is not proscribed; and that Title XIX unambiguously requires states to fund medically necessary abortions, a requirement of which states may be relieved by the Hyde Amendment, but a requirement which is nonetheless unambiguous.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing this precise issue, and this Court has already denied a writ of certiorari in three of those cases, there is no compelling reason for this Court to use its limited resources to review

this matter. The petition should therefore be denied.[4]

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED.

The lower court's decision invalidating Nebraska's restriction on Medicaid funding of abortions is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445, 1995 LEXIS U.S. App. 33214 (5th Cir. Oct. 17, 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-820);[5] *Hern v. Beye*, 57 F.3d

---

[4]Point heading I(F) of the petition seeks to "incorporate and adopt the arguments made by the Petitioner in Docket Number 95-701." To the extent this incorporation by reference seeks to evade the page limitation for petitions established by Supreme Court Rule 33, constitutes the filing of a separate brief as prohibited by Supreme Court Rule 14.2, or constitutes "failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration," Sup. Ct. R. 14.4, this incorporation by reference provides an additional ground for denying the petition. In any event, this Court denied certiorari in No. 95-701. *Weil v. Hern, cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995).

[5]In their petition for certiorari, the petitioners in *Blackwell* do not contest "that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment." Petition for Certiorari at 10, *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995) (No. 95-820); *id.* at 10 n.6 (noting that petitioners do not raise this issue).

906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal pending*, Nos. 94-1913 & 94-2097 (6th Cir. argued Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) (order granting preliminary injunction); *Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A. v. Dalton*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (state court preliminary injunction prohibiting Montana from denying Medicaid coverage for abortions for rape and incest victims).

In three of these cases -- *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v.*

Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. Indeed, in denying an application for a stay pending appeal in *Edwards v. Hope Medical Group for Women*, 115 S. Ct. 1 (Scalia, Circuit Justice 1994), Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Id. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition, as it did the petition in *Hern v. Beye*.[6]

---

[6]Petitioners argue that while "there is technically no split in the circuits with respect to the issue presented, it is clear there is a lack of unanimity and understanding regarding this question," Pet. 17, pointing to the vote counts by which the courts of appeals for the Eighth and Third Circuits denied rehearing *en banc* in this case and in *Blackwell*. This argument is flawed in two respects. First, the vote count does not indicate that the Circuit Judges voting for rehearing *en banc* disagreed with the panel decision. Second, lack of "unanimity" among *judges* of the courts of appeals is different from a lack of unanimity among *courts of appeals*.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION.

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court.

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical

assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce

abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the Department of Health and Human Services. The circumstances in which federal funds have been appropriated for low-income women's abortions has varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federally funded abortions to situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[7]

---

[7]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not

(continued...)

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenges, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal

---

[7](...continued)
to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before the Hyde Amendment was enacted.[8]

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision.

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* App. 39. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are

---

[8]Petitioners' request that this Court grant the petition to decide the question left open in *McRae* regarding whether the Hyde Amendment substantively amends Title XIX must be rejected. As shown herein, the lower court's decision is legally correct regardless of whether the Hyde Amendment substantively amends Title XIX.

> medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

App. 40-41.[9] HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

---

[9]Contrary to petitioners' argument, respondents do not claim that every Medicaid-eligible woman or girl who is pregnant as a result of rape or incest has, as a matter of law, a medical need for an abortion. Rather, they claim that if a low-income woman's physician determines "in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient," *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that an abortion to terminate a pregnancy resulting from rape or incest is in the interests of a patient's health and thus medically necessary, federal law requires that the procedure be covered by Medicaid.

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined.

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provision prohibits -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE COURT OF APPEALS CORRECTLY HELD THAT TITLE XIX IS ENFORCEABLE UNDER 42 U.S.C. § 1983.

Petitioners' attempt to construe *Suter v. Artist M.*, 503 U.S. 347 (1992), as foreclosing enforceability of Title XIX through 42 U.S.C. § 1983, was properly rejected by the court below. *See* App. 11-12.

In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), this Court wrote:

> [T]he fact that a federal statute has preempted certain state action [under the Supremacy Clause] does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.

Id. at 108. *Golden State* adopted the following test for determining whether a federal statute that preempts state action under the Supremacy Clause gives rise to a cause of action under § 1983:

> In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within the "the competence of the judiciary to enforce," is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself."

Id. Applying *Golden State*, this Court has subsequently held specifically that rights under the Medicaid statute are enforceable under § 1983. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). The decision of the court below is in complete harmony with *Golden State* and *Wilder*, and petitioners have provided no grounds for reviewing it.

Faced with this clear law, petitioners argue that the decision of the court below is in conflict with *Suter v. Artist M.*, 503 U.S. 347 (1992), where this Court held that the Adoption Assistance and Child Welfare Act of 1980 does not "confer[] an enforceable private right on its beneficiaries," *id.* at 364, because no such privately enforceable right was "unambiguously" conferred by Congress.[10] This argument fails because the obligation of

---

[10]While *Suter* may, as petitioners contend, have modified the *Golden State* test for enforceability under § 1983, clarification of that modification should await a case in which the result under *Suter*'s analysis would be different than under *Golden State*'s. This is not such a case, because, as set forth below, Title XIX and the Hyde Amendment clearly create rights enforceable under § 1983.

participating states to provide Medicaid coverage for those medically necessary abortions for which federal funding is available is unambiguous.[11]

Title XIX and the Hyde Amendment impose an unambiguous mandatory obligation. This obligation has been clear in Nebraska since 1980. As the district court held in awarding attorney's fees to respondents:

> [S]ince the courts have consistently held for more than 14 years that the states are obligated to fund medically necessary abortions under Medicaid unless the Hyde Amendment provides otherwise; and since Congress has obviously been aware of this interpretation and has chosen not to continue to give the states discretion regarding funding for abortions otherwise authorized by the 1994 Hyde Amendment; and since the 1994 Hyde Amendment (whatever else it may mean) specifically contemplates the use of Medicaid funds for abortions necessitated by rape or incest, I find and conclude that the 1994 Hyde Amendment imposed an *unambiguous* mandatory obligation on the states to fund abortions under Medicaid in the case of rape or incest.

Orr v. Nelson, 874 F. Supp. 998, 1003-04 (D. Neb. 1995)

---

[11]Moreover, unlike the claims of the petitioner in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), petitioners here cannot reasonably claim that they were unaware that the Hyde Amendment provides a floor for Medicaid coverage of abortion. By 1982, when the challenged provision was promulgated, several federal appellate courts, including the court of appeals for the Circuit in which Nebraska is located, had already decided that state Medicaid programs must fund abortions for which federal funding is not proscribed. *See Roe v. Casey; Reproductive Health Services; Hodgson; Zbaraz; Preterm.*

(emphasis in original), *aff'd*, No. 95-1555 (8th Cir. Oct. 4, 1995). Thus, the court of appeals correctly held that § 1983 is available to respondents to enforce their federal rights under Title XIX and the Hyde Amendment.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON HELLER
(Counsel of Record)
JANET BENSHOOF
The Center for Reproductive Law & Policy
120 Wall Street - 18th Floor
New York, New York 10005
(212) 514-5534

December 6, 1995